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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

PAUL PIUS DUFFY

Mr Mark Mulholland KC with Mr Stephen Toal (instructed by KRW Solicitors) for the Appellant
Mr Ciaran Murphy KC with Mr Robin Steer (instructed by the Public Prosecution Service) for the Respondent

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Before: Keegan LCJ, Horner LJ and Sir Donnell Deeny

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This appeal is brought by Paul Pius Duffy, who was convicted of nine counts on an indictment including two counts of manslaughter on foot of guilty pleas before Lord Justice Murray, on 17 May 1993. The appellant now contests the safety of the convictions, arguing that his confessions were secured through coercion, rendering them inadmissible as evidence.

[2] In support of this claim, the appellant seeks to admit fresh evidence before this court consisting of three expert opinion reports, separate RUC interviews against another suspect, evidence of complaints made against several of the interviewing officers, and the affidavit evidence of the appellant.

[3] No appeal against conviction was made at the time. It is only now, some 30 years after the fact, that the appellant seeks to challenge his conviction.

[4] The nature of this appeal means that it has been brought out of time. That being so, leave to appeal was granted by McCloskey J in a ruling dated 13 February

2019. The practice of the Court of Appeal has now changed in that such applications are now heard by the full court as all issues need to be canvassed before a decision can be made. This court must therefore consider the issue of extension of time itself in this case as in any other similar case. The application to adduce further evidence was correctly left to be determined by this court. We must also consider the merits of the appeal.

The issue

[5] As is immediately apparent, the success of this appeal hinges on the safety of pleas of guilty that were, in the eyes of the trial judge, freely given. Courts at the appellate level are – rightly – slow to intervene in cases where a guilty plea is appealed. The recent case of *R v Tredget* in the English Court of Appeal sets out the circumstances in which a court may vitiate a guilty plea [2022] EWCA Crim 108). Further, there is some support for intervention notwithstanding a guilty plea in the Court of Appeal's analysis in *Hamilton v Post Office* [2021] EWCA Crim 577 which dealt with the convictions of sub-postmasters. Both cases will be analysed in some detail below.

[6] Within the factual matrix summarised above the appellant asks this court to execute three functions: (i) to extend time for the appeal; (ii) to admit fresh evidence; and (iii) to allow the appeal.

Factual background

[7] Catherine and Gerard Mahon were murdered by the Provisional Irish Republican Army ("PIRA") on the night of 8 September 1985. The prosecution's case at the time was that the Mahons were taken from their place of unlawful detention at 100 Monagh Road to an address at Norglen Crescent by the appellant in his taxi. The victims were then taken into an alleyway by three men and were shot dead. The murderers then went back to the taxi where Mr Duffy drove them away. A short distance later, the taxi broke down and the men – including the appellant – made off on foot.

[8] At this remove, it is necessary to record that Mr Duffy was not the first person suspected to be the taxi driver. Rather, in the course of their investigation, the RUC originally arrested and questioned "AB" between 1–7 October 1985. AB remained silent throughout interview and was subsequently released without charge. It is the appellant's case that records of the AB materials were not disclosed to the defence. The significance of this omission will be returned to below.

[9] The events that led to the appellant's arrest arose in March 1991, when CD was arrested on suspicion of planting incendiary devices in Belfast. CD was interviewed extensively, during which time he made admissions in respect of serious offences. CD named individuals who he said were members of PIRA, making a number of written statements to this effect.

[10] We now know (although we cannot be certain that this information was disclosed at the time) that CD disclosed to interviewing officers that, "Duff from St James drove [the] B/hack [Black hackney] on murder of McMahons [sic]." (CD subsequently withdrew his assertion that he was willing to testify against other persons, with the result that the appellant's trial ran solely on the confession secured by interviewing officers.)

[11] Mr Duffy was ultimately arrested on 24 July 1991 and was detained at Castlereagh Holding Centre. As recorded by the appellant's counsel in their written submissions, Duffy was questioned at length on that day and the following day, confessing to a role in the murder of the Mahon's late on 25 July. He made further admissions in subsequent days until he was charged on the 28th. The appellant was questioned by a rotating team of interviewing officers, who are now all dead or retired.

[12] It is common case between the parties that throughout the first 13 interviews, the appellant maintained his innocence and denied any role in the murder of the Mahons, being a member of the PIRA or being in any way involved in PIRA activities. However, by the 14th interview, the appellant confessed to his involvement in the Mahon murders. By that stage, the appellant had been interviewed for a cumulative period of 17 hours 45 minutes, less than 48 hours after his detention. During this time, he was held incommunicado, and, owing to the emergency provisions in place at the time, did not have any outside support from a legal representative.

[13] The salient part of the 14th interview was recorded as follows:

> "Duffy asked me what the position was in relation to his family. […] I said I could not provide protection for them but that I thought they were not in any danger. Duffy asked me if he could speak to his Priest. I said […] it would be unlikely he could see one at this stage. […] He asked about seeing his solicitor. I stated that I understood a deferral had been placed on him seeing his solicitor at the moment but that he would see him tomorrow. […] I could see that Duffy looked very concerned and I told him that he should now tell the truth in respect of his involvement in the murder of Mr & Mrs McMahon [sic] and that he should tell the two interviewing Detectives now present. He nodded. I then left the interview room. These notes were recorded by me immediately thereafter."

[14] Following from this indication we note that Duffy originally gave a very short confession statement, totalling just 208 words. The interviewing officers continued

to question the appellant, with the result that three further confession statements were recorded. Version 2 contained 531 words, version 3 920 words, and version 4 646 words. These statements were recorded between Thursday 25 July and Friday 26 July 1991.

[15] After securing Duffy's confession, the interviewing officers proceeded to question the appellant about his membership of and involvement with the PIRA. In the course of these interviews, Duffy admitted that he had joined the PIRA (interview 20), that he moved rifles on at least four occasions and had moved explosives on a "couple of occasions" in June 1985 (interview 19); that he was interrogated by PIRA as a suspected tout and was stood down, before ultimately leaving the movement at the end of November 1985 (interview 20).

[16] These confessions, taken together, formed the basis of the prosecution's evidence against Duffy. The appellant was charged with the murders and false imprisonment of the Mahons. He was also charged with conspiracy to murder and possession of firearms and explosives as well as membership of the IRA. By the time the trial process began on 20 April 1993, however, the appellant reneged on his confession evidence and pleaded not guilty to the charges before him.

The trial

[17] The trial was heard at Crumlin Road Courthouse before Murray LJ. Mr Creaney QC and Mr Lynch BL (now HHJ Lynch KC) conducted the prosecution's case. Ms Eilis McDermott QC and Mr Charles Adair BL represented the appellant. The process began with a lengthy *voir dire*, the defence challenging the admissibility of the confession evidence. The appellant testified over seven days (from 20–28 April 1993), before the interviewing officers then gave their evidence, lasting from 28 April – 13 May 1993.

[18] We have had the benefit of reviewing transcripts of the evidence adduced at trial including that at the *voir dire*. We highlight matters as follows. In the course of the appellant's cross-examination, he alleged that he was shown on more than one occasion an album of postmortem photographs contained within a green file with the heading "Mrs C Mahon." Throughout this section of the cross-examination, the appellant consistently maintained that this folder was brought into the room by DS M, and that he was shown the photographs. Both Mr Lynch and Murray LJ pressed the appellant on this issue. It was left that this statement was an invention on the part of Mr Duffy. However, it was later accepted in a note by Mr Lynch that such a green file was in use during Duffy's interviews, and that "[t]his file had been in the interview room and each of the interviewers accepted that he would have read it to prepare him for the interviews." This information was disclosed to defence counsel on 12 May 1993.

[19] This note, which has come to be known as "the Lynch Note", also revealed that records of telephone messages made at the time of the murders were also

known to the RUC, and that these messages did not contain any reference to the appellant. Rather, the messages named AB as the taxi driver involved in the Mahons' murder. A summary version of these messages was compiled by police and handed to the defence as part of the prosecution's disclosure on 12 May.

[20] The *voir dire* process continued until its 17th day (Friday 14 May), when the court log records that the defence asked the judge in chambers for some time to consult with their client. Mr Lynch briefly addressed the judge in open court, and the court was adjourned until 10:30 on 17 May 1993. On the morning of Monday 17 May, the appellant asked to be re-arraigned, at which time he pleaded guilty to manslaughter, which the prosecution accepted. He was sentenced to five years' imprisonment for each manslaughter. He also pleaded guilty to counts 3 and 4 (the false imprisonment of Gerard and Catherine Mahon), and count 5 (membership of a proscribed organisation, the PIRA) receiving a sentence of five years for each. He further pleaded guilty to count 14 (conspiracy to murder members of the security forces), counts 10 and 12 (possession of explosives with intent to endanger life), counts 6 and 8 (possession of firearms with intent to endanger life) and a further such count 16 in respect of two rifles between 30 June 1985 and 1 August 1985, receiving sentences of 10, 8, 8,7,7 and 7 years respectively. All sentences were ordered to run concurrently.

[21] The appellant was therefore sentenced to 10 years' imprisonment on that day for conspiracy to murder and not for manslaughter, as he erroneously stated in his first Notice of Appeal (23 July 2018) and presumably believed. Indeed, in that Notice he appeared to have forgotten that he had other convictions. It is a reminder of the dangers of relying on mere recollection, even of an important matter, 25 or 30 years after the event. In the course of sentencing Murray LJ made the following remarks:

> "Now, the implication, or implications, I should say, of your guilty plea to the manslaughter of the Mahons, and the Crown's acceptance of it, must be that you admit to taking part in the last movement of the Mahons, but the Crown feel unable to prove beyond all reasonable doubt that you knew at the time of the diabolical plot to kill those two young people.
>
> […]
>
> You clearly must expect to be punished, and punished severely, however, for having any part, even a peripheral part, in a sinister operation of that kind. Now, from what I have heard I incline to the view, and indeed the charge of membership would support this, I incline to the view that your membership of the Provisionals was neither lengthy nor really dedicated.

> […]
>
> Now, in passing this sentence I wish to state clearly and unequivocally that what might appear to be an unduly lenient sentence, and I'm aware of that possibility, having regard to what I have just said about the Court of Appeal's views, I am passing it in what I regard as the special circumstances of this particular case. Your behaviour, both during police interview and indeed in this court, they have been very different from what I would describe as the typical behaviour of the hardened member of the Provisional IRA."

[22] It is interesting to note the submissions of senior counsel in her plea to the court. Such submissions are made, of course, on instructions. She emphasised that the offences to which he pleaded guilty took place over seven years before and that by the time of his arrest in 1991 his life had "taken a completely different course." She said, "that because of the turn that this case took, the accused now has an opportunity to make something of his life and I can certainly assure Your Lordship that that is what he intends to do." The appellant may not now recollect that that was his position at the time he pleaded guilty ie that he had taken a "completely different course" after the time of the offences. No appeal was lodged. As the appellant was not convicted of murder, he was eligible for remission after serving half of his sentence.

The application to introduce fresh evidence

[23] To now demonstrate that his conviction is unsafe, the appellant seeks to introduce the following fresh evidence:

(i) Three expert opinion reports; these being:

(a) A report by Dr Eric Shepherd dated 19 October 2022, commissioned by the appellant's solicitors, providing psychological assessment of the interviewing of Mr Duffy at Castlereagh and commentary upon the reliability of Mr Duffy's confession (hereinafter, the "Shepherd Report") plus an addendum report;

(b) A report by Professor Gary Macpherson dated 1 November 2022, commissioned by the PPS, that provides opinion evidence on the psychological effect of being detained and interviewed over a prolonged period of time and an analysis of the wording used in the confession (hereinafter, the "Macpherson Report"); and

(c) A report by Dr Nicci MacLeod dated 21 November 2022, commissioned by the PPS, that carries out an analysis of the wording and language used in the confession, being an assessment of whether this reflects the police writing down what the appellant is saying or whether it indicates that the police are drafting the confession in their own terms and attempting to attribute it to the defendant (hereinafter, the "MacLeod Report").

(ii) An affidavit sworn by the appellant dated 16 January 2023;

(iii) A summary of complaint files in respect of the appellant's interviewing officers, as agreed between the parties and information disclosed by the PPS to the appellant in a letter dated 25 November 2022 (hereinafter, the "gisted information"); and

(iv) Interview notes in respect of the arrest and interview of AB.

[24] The application to introduce the expert opinion reports was lodged on 16 January 2023. The application to introduce the remainder of the evidence was lodged on 2 June 2023. A third application was made before the start of the hearing, seeking to introduce an addendum to the Shepherd Report. The court has reviewed this material and as indicated during the appeal hearing proposes to deal with it *de bene esse*.

[25] It is the appellant's case that each aspect of this fresh evidence, taken individually or together, is capable of belief and may afford a ground for allowing the appeal, which should ultimately lead the court to query the safety of the conviction. But what does this new evidence demonstrate? To answer this question, we begin by a discussion of each piece of evidence in turn.

The application to admit expert reports

[26] The Shepherd Report is the most substantial of the expert reports which the appellant seeks to admit. It considers each interview conducted while the appellant was at Castlereagh. Dr Shepherd is a forensic psychologist and a retired lecturer, having previously been based at the Department of Psychiatry in Guy's Hospital, London. The remit of the report was to examine the case papers, including the gisted disclosure (outlined below) and to provide: an opinion on the interviewing of Mr Duffy; and comment on the reliability of Mr Duffy's confession to involvement in the murders of the Mahons, and following upon this, his confessions to terrorist offences.

[27] Dr Shepherd opined upon the context of the arrest (including police attitudes to 'confession culture' at the time), the psychological impact of subjective stress as well as stress-inducing conduct and behaviours commonly used in interviews and the premise of confabulation (that is to say, when a suspect makes something up in order to satisfy the person asking the question). From there, Dr Shepherd examines

the impact that the interviews had on the appellant from a psychological perspective.

[28] As to the interview technique employed by the officers at Castlereagh:

> "18.3 In my professional opinion this was a strategy to inflict severe mental suffering by a process of intensive, protracted interviewing that occupied the greater part of Mr Duffy's waking days. It generated within Mr Duffy, as it would within anyone in such a situation, cumulative stress and distress in the form of:
>
> - Ever-increasing experience of subjective stress – perceived inability to control what was happening and what was happening to him;
>
> - Increasingly intense and debilitating symptoms of the human stress response affecting his cognitive functioning, his emotional state, and psychological functioning."

[29] As to the appellant's confession statements Dr Shephard opines as follows:

> "18.11 In my opinion, none of the detail that Mr Duffy disclosed throughout Interview 17 to Interview 28 can be relied upon. It was born of a coerced confession to involvement in the murders of the Mahons, and his multiply flawed successive versions of a confession narrative which progressively confabulated detail about membership of the PIRA and terrorist activities prior to the murders."

[30] Self-evidently Dr Shepherd reached these conclusions following extensive analysis of the interview records made available to him. This detail was helpfully set out in two annexes to the reports, which we have analysed as part of our consideration.

[31] In response to the Shepherd Report, the PPS commissioned the Macpherson and MacLeod Reports. Professor Macpherson is a registered forensic psychologist who is employed by the State Hospitals Board for Scotland and is a professor of forensic and legal psychology at Erasmus University, Rotterdam, and a professor in forensic psychology at Maastricht University.

[32] The Macpherson Report similarly reviewed the psychological effect of being detained and interviewed over the relevant period of time with regard to whether

the confession is false; and provided an analysis of the wording and language used in the confession, being an assessment of whether this reflects the police writing down what the appellant is saying or whether it indicates that the police are drafting the confession in their own terms and attempting to attribute it to the defendant.

[33] In compiling his report, Professor Macpherson had access to the same materials as Dr Shepherd, and further had the benefit of the Shepherd Report. It suffices to set out only the relevant aspects of Professor Macpherson's conclusions. As to the confession Professor Macpherson opines:

> "32. I am not able to offer a view on 'whether the confession is false' as this is a matter for the court – however I would suggest that statements provided by Paul Duffy as a consequence of mass interviewing and prolonged interviewing may have resulted in a stress-induced or coerced confession and my overall opinion is that it may be unsafe to rely on the admissions made by Paul Duffy."

[34] Professor Macpherson also made the following concluding observations:

> "49. I am aware that Paul Duffy's confessions became the subject of *voir dire* as to the admissibility of the confessions and so may have already been tested by the court although I have no detail of the proceedings at the time of the *voir dire*. Paul Duffy's continued plea of innocence may have strengthened the claim that the confession he provided was 'false' – that Paul Duffy chose to plead guilty to manslaughter and his involvement in a variety of terrorist offences is not easily reconciled with his allegation that his confessions were false. I have been unable to explain this aspect of the case, and this may require further explanation."

[35] Dr MacLeod is a freelance forensic linguist and senior lecturer in forensic linguistics at the Aston Institute for Forensic Linguistics, Aston University. Dr MacLeod was asked to carry out an analysis of the wording and language used in the confession, being an assessment of whether this reflects the police writing down what the appellant is saying or whether it indicated that the police are drafting the confession in their own terms and attempting to attribute it to the defendant.

[36] Dr MacLeod explained the relevant aspects of her analysis including (but, for the purposes of this summary, not limited to) the premise of 'Policespeak' the use of multiple voices, and the uniqueness of encoding (that is to say, the choices that a given writer will make when expressing their thoughts/experiences on paper). Considering these aspects, Dr MacLeod reached the following conclusions:

> "66. It is in my opinion fairly likely that the sentences attributed to Duffy are the result of elicitation and are records of conflated question-and-answer sequences (dialogue) recorded as monologue.
>
> 67. It is in my opinion fairly likely that sections of the statements attributed to Duffy were produced by police officers and inaccurately attributed to Duffy.
>
> 68. It is in my opinion irrefutable that the police witness statements of DCs B, W, S, D and those of DS M and DI N, were produced through collusion. I consider it likely that this collusion goes further but time limits constrain me to discussing these statements alone."

The appellant's affidavit

[37] The appellant lodged an affidavit before this court dated 16 January 2023. It is a short document that sets out his recollection of the events surrounding the *voir dire* process in April and May 1993. The appellant frames the impetus for submitting this affidavit as:

> "I was on the link when the Court of Appeal indicated that my explanation may assist the process if it is provided at this stage."

[38] We further gave the appellant the opportunity to testify before us, but he declined to do so. During the hearing his counsel submitted a medical report dated 21 February 2024 that advised against such testimony on the basis that it would cause stress and anxiety and exacerbate severe COPD. What follows is a brief summary of the appellant's affidavit evidence.

[39] First, we note that the appellant makes no complaint of his original counsel. He insists that they did not put undue pressure on him to change his plea; going so far as to say they were "brilliant" and they "saved [him] from a life sentence."

[40] As to the *voir dire* process itself, the appellant recounts a fractious process, alleging that the interviewing officers were "caught out in lie after lie." He states that after one month of evidence,

> "the judge publicly said to the prosecutor that he wasn't getting what he wanted, and he then also turned to my counsel and said your client isn't getting what he wants either."

[41] Further, it appears from the affidavit that the appellant believes that the trial judge's remarks occurred on the Friday (although he admits that his memory may not serve him faithfully in this matter). If the appellant is correct in his recollection, and his dates, this would align with the meeting in chambers between Murray LJ and prosecuting and defending counsel, which the log records as also happening on 14 May. As Mr Mulholland for the appellant maintained in oral submissions, the remarks therefore may have had a bearing as to whether a deal between the parties would be appropriate. This is a significant allegation, which will be considered further below.

[42] The appellant also avers in the affidavit that after the exchange, he was informed by another prisoner (who had met with his solicitor) that the appellant was to be given a 'deal.' This transpired on the morning of 17 May, the appellant's solicitor informing him that he would receive a 10-year sentence if he pleaded guilty. We express some scepticism at the suggestion that the first he heard of "a deal" was from another prisoner rather than his solicitor or counsel. Mr Lynch in his note records that the defence "asked Crown counsel to consider accepting a plea to manslaughter on counts 1 and 2." Are we expected to believe that they did so without consulting their client?

The appellant states:

> "I turned this down and said I would fight on. I was placed back into the cells."

[43] However, as is of course known by now, the appellant changed his mind. He says he did so after his father was, exceptionally, allowed in to speak to him. The appellant's father implored him to consider the impact that a murder sentence would have on his children and how, in contrast, a plea for manslaughter would mean that the appellant could be released from prison by July 1996 (taking account for 50% served as remission and then time already served). The appellant explains his decision in this way:

> "I therefore had the choice to make between being there for at least some part of my children's childhoods, or not seeing them again until they were in their late 30's or 40's. I felt extremely pressurised by my father and my family circumstances. I felt compelled by my father's advice, and in order to avoid a life sentence for something I didn't do, I pleaded guilty to the reduced charges of manslaughter and the other offences."

The gisted information

[44] The gisted information contains both complaints made against the interviewing officers in separate cases and information relevant to the appellant's original trial.

[45] The DPP disclosure lodged for this appeal reveals a number of complaints made against the appellant's interviewing officers. None of the complaints resulted in conviction, but Mr Mulholland for the appellant made the point before this court which is a matter of public record that DC Bohill had been the subject of a prosecution at Newtownards Magistrate's Court on 31 October 1978 for assault in connection with the interview of Patrick Fullerton. The district judge in that case concluded that Fullerton had been assaulted, but that he could not determine which of the officers had perpetrated the assault, resulting in no conviction. (Further allegations against DC Bohill were also considered by this court in *Re McCartney and Others* [2007] NICA 10, paras [22]-[25]; and *The King v Patricia Wilson* [2022] NICA 73, para [48]. These cases are mentioned only for completeness.)

[46] In a more general sense and bearing in mind that no prosecutions were recommended save in the case of DC Bohill, an agreed schedule was admitted by the parties setting out the gist of the complaints against Mr Duffy's interviewing officers which we have considered.

[47] The prosecution further disclosed to the appellant's counsel the Lynch Note. Annexed to that note was a precis of telephone messages made in the aftermath of the murder of the Mahons. This was disclosed to the defence at the time of the trial. The contents of the most relevant telephone messages are set out here:

> **"Message no. 7**
>
> Message received dated 11.9.85.
>
> 'Bap' Campbell drove a taxi (black) to scene**.** (This person could refer to either of the following: 1. Patrick 'Bap' Campbell, 11 Suffolk Crescent: 2. John Martin 'Bap' Campbell, 47 Divismore Crescent). There was a lead car, a blue coloured Cortina driven by a female. After the shooting two males and a female left the scene in a blue car. Campbell and two other males left in a taxi (black) and then struck a vehicle outside No. 6 Norglen Grove. All three got out of the taxi and went towards 50 Norglen Drive, identified as the home of Jim Smith ex INLA now PIRA. Campbell was seen standing outside the house and the other two males went into the house as a Police patrol passed. Another address for 2 above is 1E Ardmore Gardens.

> **Message no. 8**
>
> Message received dated 12.9.85. (Relates to previous message).
>
> Ref info about 'Bap' Campbell this is now found untrue the person who drove the taxi is [AB] who looks similar to Campbell. [AB] also owns a black taxi."

[48] The Lynch Note further indicated that some of the information relating to the Mahon murders came from Special Branch. The appellant contends that this was not disclosed to the defence at the time of the trial. However, the prosecution covering letter seemingly disputes this, averring instead:

> "As stated, the gisted information was disclosed at the time of the *voir dire*. As stated in the disclosed report this information came from Special Branch."

[49] The Lynch Note confirms that the defence asked Crown counsel to consider a plea of manslaughter at the time of the trial. It was indicated on 14 May 1993 that the Crown would be prepared to accept this plea.

[50] The final aspect of information disclosed in the gisted material concerns the interview of AB by RUC officers. These were, it was accepted, not disclosed to the defence at the time. Rather, these interviews were disclosed during the currency of this appeal, under a cover letter dated 27 October 2022.

[51] A synopsis of these interviews has helpfully been provided by Mr Toal on behalf of the appellant. We have considered same. The utility of these interviews, it is said, is that had they been disclosed, they would have provided the original defence with more material to contest the safety of the guilty plea.

[52] Throughout these interviews, AB made no reply. He was released without charge on 7 October 1985.

The third application to introduce evidence

[53] A third application to introduce evidence was submitted extremely late in the day, on the Friday before the appeal hearing was due to start. The application concerned an addendum to the Shepherd Report, in which Dr Shepherd examined the partially transcribed record of the *voir dire* process and gave an opinion as to its bearings upon the conclusions of the original report.

[54] The headline conclusion of this addendum report is that an examination of the partially transcribed record of testimony given during the *voir dire*, confirms the conclusions reached in the primary report. However, Dr Shepherd also sets out his opposition to a conclusion reached in the Macpherson report, that Duffy's access to legal advice before and during the trial militates *against* a coerced confession (see paras [32] and [49] of the Macpherson report, highlighted supra at [33] and [34]). Dr Shepherd advocates that the better view is that the risk of a long sentence would have induced, or at least encouraged, the appellant into pleading guilty to the lesser offence. He refers to "the key incentive to plead guilty to manslaughter was that he would be out of prison and with his family again within a bearable time frame."

Discussion of the issues

[55] We begin by reminding ourselves of the legal tests we must apply to this appeal. First, the overarching test in an appeal which is applied in this jurisdiction is found in *R v Pollock* [2004] NICA 34 per Kerr LCJ at para [32] which reads:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe?'
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[56] Whilst *R v Pollock* expanded on how an appellate court should approach a case, we reiterate the fact that the test is only whether the conviction is safe or not encapsulated at 1 above. That is the simple legal test that we approve which should be applied in cases of this nature.

[57] The test to adduce fresh evidence flows from the terms of section 25 of the Criminal Appeal (Northern Ireland) Act 1980 ("the 1980 Act"). It states:

> "25(1) For the purposes an appeal, or an application for leave to appeal, under this Part of this Act, the Court of

> Appeal may, if it thinks it necessary or expedient in the interests of justice-
>
> (a) …
>
> (b) …
>
> (c) receive any evidence which was not adduced at the trial.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to -
>
> (a) whether the evidence appears to the court to be capable of belief;
>
> (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[58] In *The King v James Alexander Smith* [2023] NICA 86, this court set out the guiding principles on when the test will be met in paras [25]-[30].

[59] We remind ourselves of what this court said at para [30] from the above decision as follows:

> "We have also been referred to a helpful synopsis of the approach to fresh evidence in appellate proceedings from *Valentine's Criminal Practice and Procedure* which reads as follows:
>
> > 'If it finds the new evidence conclusive in favour of the appellant it simply quashes the conviction. If after considering the new evidence plus the original trial evidence, it finds that a reasonable court of trial might have a reasonable doubt as to guilt, it quashes the conviction and then considers whether to order a new trial. If on all the evidence now available there is no reasonable doubt, the

> conviction should be affirmed. These principles have to be applied where the new evidence on both sides consists of expert opinion. If the original conviction was therefore based on a premise now shown to be unfounded and the evidence as a whole is such that a reasonable court of trial may resolve the conflict of fact and opinion in such a way as to find a reasonable doubt, the conviction must be quashed. The sole test is whether the conviction is unsafe, and this usually means that the court thinks that the evidence might have reasonably affected the jury's decision to convict: *Pendleton; O'Doherty* [2002] NILR 263 per Nicholson LJ at 273c - 275b, e.'"

These principles we apply here.

[60] In *R v Pendleton* [2002] 1 Cr App R 34, the House of Lords considered the circumstances in which fresh evidence should be admitted. Lord Bingham said at para [10]:

> "The Court of Appeal will always pay close attention to the explanation advanced for failing to adduce the evidence at the trial, since it is the clear duty of a criminal defendant to advance any defence and call any evidence on which he wishes to rely at the trial. It is not permissible to keep any available defence or any available evidence in reserve for deployment in the Court of Appeal. Thus, the practice of the court is to require a full explanation of the reasons for not adducing the evidence at the trial: *R v Trevor* [1998] Crim LR 652. It is, however, clear that while the court must, when considering whether to receive fresh evidence, have regard in particular to the matters listed in section 23(2)(a) to (d), and while in practice it is most unlikely to receive the evidence if the requirements of (a), (b) and (c) are not met, the court has an overriding discretion to receive fresh evidence if it thinks it necessary or expedient in the interests of justice to do so."

[61] In a subsequent case of *R v Erskine* [2009] 2 Cr App R 29, Lord Judge CJ said at para [39]:

> "Virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to

> receive fresh evidence is a wide one focusing on the interests of justice. The considerations listed in subs (2)(a) (d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However, it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore, if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied."

[62] Section 25(2) of the 1980 Act contains four considerations from (a)-(d) that the court must have regard to when deciding whether the interests of justice test is satisfied. These requirements are; whether the proposed evidence appears capable of belief, whether it may afford a ground for allowing the appeal, whether it would have been admissible at trial, and whether there is reasonable explanation for failing to adduce the evidence at trial.

[63] The authorities make clear that the failure to provide a reasonable explanation is not determinative of the interests of justice test. See *R v CCRC ex p. Pearson* [2000] 1 Cr App R 141, [13] per Lord Bingham.

[64] Further guidance is found in *R v Pendleton*. In that case the House of Lords considered how the appellate court should assess the potential impact of fresh evidence on the safety of the conviction. Lord Bingham emphasised the need for the appellate court to bear in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty.

[65] Recognising the limitations of an appellate court over a court of first instance Lord Bingham also established what has latterly become known as the jury impact test. He then concluded on this point as follows:

> "… The Court of Appeal can make its assessment of the fresh evidence it has heard but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might

> reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

[66] The court must also consider whether an extension of time for appeal is merited on the particular facts of this case. In this regard the key issue in this appeal is the question of overturning what the trial judge considered to be a freely made guilty plea. The significance of a guilty plea is well-accepted. As put by Lord Hughes in *R v Asiedu* [2015] EWCA Crim 714 at para [19]:

> "A defendant who pleads guilty is making a formal admission in open court that he is guilty of the offence. He may of course by a written basis of plea limit his admissions to only some of the facts alleged by the Crown, so long as he is admitting facts which constitute the offence […]. But ordinarily, once he has admitted such facts by an unambiguous and deliberately intended plea of guilty, there cannot then be an appeal against his conviction, for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be permitted in this court to say that he has changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court."

[67] As is well understood an appellate court has the power to vitiate a guilty plea only in the most limited of circumstances. Recent authoritative guidance was provided by the English Court of Appeal in this matter in the case of *R v Tredget* [2022] EWCA Crim 108. This is a persuasive authority which this court has applied in *R v Jamieson* [2023] NICA 51 and which we adopt.

[68] Delivering the judgment of the court, Fulford VP set out three categories, derived from the caselaw up to that point, where a guilty plea may be set aside. Although of some length, it is important to set out the relevant section of Fulford VP's judgment *in extenso* with emphasis added at para 162:

> **"<u>The First Category</u>**
>
> 154. First, there may be a variety of circumstances in which the guilty plea is vitiated. An obvious one is where an equivocal or an unintended plea was entered. Similarly, in *R v Swain* 1986 Crim LR 480 the appellant's conviction was quashed on the basis of evidence that there was a very real risk that he had been affected by delusion caused by LSD at the time he changed his plea to guilty, and for a short time thereafter. In those

circumstances, the court held that the conviction was unsafe and unsatisfactory.

155. Equally, an appeal may be allowed when "the plea of guilty was compelled as a matter of law by an adverse (and, we add, wrong) ruling by the trial judge which left no arguable defence to be put before the jury" (see Asiedu at paragraph 20, as endorsed *in R v Fouad Kakaei* [2021] EWCA Crim 503 at paragraph 75). This situation is, however, to be contrasted with the position when there is an adverse ruling by the judge which renders the defence being advanced more difficult, even to the point of being near hopeless, as distinct from unarguable: "A change of plea to guilty in such circumstance would normally be regarded as an acknowledgment of the truth of the facts constituting the offence charged" (per Auld LJ in *R v Chalkley* [1998] 2 Cr. App. R. 79; [1998] Q.B. 848, at 94 and 864, and see *Asiedu* at paragraph 20). In such a situation a defendant who contests his guilt can plead not guilty and challenge the disputed adverse ruling on appeal, whereas the defendant who has no defence left to put to the jury cannot.

156. Similarly, a guilty plea might be vitiated by improper pressure, for instance from the judge. In *R v Nightingale* [2013] EWCA Crim 405; [2013] 2 Cr App R 7, Lord Judge CJ at paragraph 16 observed,

> 'The question is whether (the intervention) by the judge, and its consequent impact on the defendant after considering the advice given to him by his legal advisers on the basis of their professional understanding of the effect of what the judge has said, had created inappropriate additional pressures on the defendant and narrowed the proper ambit of his freedom of choice.'

The court determined that the plea of guilty was, in effect, a nullity. And in *R v Inns* (1974) 60 Cr App R 231, Lawton LJ suggested at page 233 that,

> 'When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being

> a proper plea at all. All that follows thereafter […] is a nullity.'

157. If it is established that incorrect legal advice had been given, this too can result in the conviction being quashed/treated as a nullity, certainly in the restricted circumstances described by Scott Baker LJ in *R v Saik* [2004] EWCA Crim 2936:

> '57. For an appeal against conviction to succeed on the basis that the plea was tendered following erroneous advice it seems to us that the facts must be so strong as to show that the plea of guilty was not a true acknowledgment of guilt. The advice must go to the heart of the plea, so that […] the plea would not be a free plea and what followed would be a nullity.'

158. An appeal can, however, succeed if vitiated by erroneous legal advice or a failure to advise as to a possible defence, even where the advice may not have been so fundamental as to have rendered the plea a nullity, if its effect was to deprive the defendant of a defence which would probably have succeeded. In *R v Boal* [1992] QB 591, it was decided that if a possible line of defence is overlooked, exceptionally the court will be prepared to intervene, although only if the defence would quite probably have succeeded and the court concludes, therefore, that a clear injustice has been done (see pp. 599 and 600). This approach was endorsed in *R v Mohamed (Abdalla)* and others [2010] EWCA Crim 2400; [2011] 1 Cr. App. R. 35 (a case in which a defence under section 31 of the Immigration and Asylum Act 1999 had been overlooked) and in *R v McCarthy* [2015] EWCA Crim 1185. In the latter case, the court was "far from confident that when the applicant pleaded guilty to the offence of wounding with intent he had a proper understanding of the elements of the offence" (see [81]). Similarly, in *R v Whatmore* [1999] Crim. L.R. 87 the court quashed the appellant's convictions on the basis that he had received misleading advice on which he relied, rendering the convictions unsafe (he had pleaded guilty to two counts of sexual offences against his daughter, having been led erroneously to understand that those allegations would not, as a consequence, feature as part of the evidence during another trial). Here the pleas were in

effect induced by misleading legal advice. Waller LJ indicated at page 9:

> '[…] the defendant had not admitted his guilt and was pleading on the basis that if he pleaded, the daughter's allegations would never become part of the case at all and he was content, in effect, to take a sentence which he had already served in return for pleading to something which he did not admit. In those circumstances, as it seems to us, it cannot be said that the conviction on those pleas are safe.'

159. In *R v PK* [2017] EWCA Crim 486 Sir Brian Leveson P. emphasised the approach just described, namely that the Court of Appeal would only intervene on the basis that the conviction was unsafe when it believed the defendant had been deprived of what was in all likelihood a good defence in law, which would quite probably have succeeded and, as a result, a clear injustice had been done.

<u>The Second Category</u>

160. There is a distinct category of cases which do not depend on the circumstances in which the plea was entered or indeed upon whether the accused is innocent or guilty, but instead arise when "there (is) a legal obstacle to his being tried for the offence, for instance because the prosecution would be stayed on the grounds that it is offensive to justice to bring him to trial. Such cases are generally described, conveniently if not entirely accurately, as cases of "abuse of process"; in these circumstances "a conviction upon a plea of guilty is as unsafe as one following trial" (see *Asiedu* at paragraph 21). By way of example, entrapment, if made out, can amount to unfairness which would render it an abuse of process to try the defendant (see *Asiedu* at paragraph 25). So, one example of a case coming withing this second category is when an abuse of process is established such that renders it unfair to try the defendant at all. As Lord Woolf CJ observed *in R v Togher & others* [2001] 1 Cr App R 33 at paragraph 31,

> 'Certainly, if it would be right to stop a prosecution on the basis that it was an abuse of

> process, this Court would be most unlikely to conclude that if there was a conviction despite this fact, the conviction should not be set aside.'

The court in *Togher* at page 161 G approved what it described as the "broad" approach adopted in *R v Mullen* [1999] 2 Cr App R 143; [2000] QB 520, per Rose LJ:

> '... for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed, the Oxford Dictionary gives the legal meaning of 'unsafe' as 'likely to constitute a miscarriage of justice.'

161. A further type of case within this category is when there is a fundamental breach of the accused's right under article 6 of the European Convention on Human Rights to a fair and public hearing by an independent and impartial tribunal. It is unnecessary for the defendant to establish prejudice in this context (see *R v Ilyas Hanif* [2014] EWCA Crim 1678 and *R v Abdroikov, R v Green, R v Williamson* [2007] UKHL 37, in which latter case Lord Bingham observed at paragraph 27 that "[…] even a guilty defendant is entitled to be tried by an impartial tribunal […]").

<u>The Third Category</u>

162. In the case of category 1, the ordinary consequences of the public admission of the facts which is constituted by the plea of guilty are displaced by the fact that the plea was vitiated, whether in fact or by reliance on error of law. In the case of category 2, the ordinary consequences of the public plea are irrelevant, because the defendant ought not to have been subjected to the trial process (or to that form of trial process) at all. But ordinarily, the plea of guilty, by a defendant who knows what he did or did not do, amounts to a public admission of the facts which itself establishes the safety of the conviction. There remains, however, a small residual third category where this cannot be said. That is where it is established that the appellant did not commit the offence, in other words that the admission made by the plea is a false one.

163. In *R v John Verney* (1909) 2 Cr App R 107, the appellant's conviction for sacrilege, on his guilty plea and for which he received 12 months' imprisonment with hard labour, was quashed on the basis that it was established that he had been in prison on the relevant date and thereby he had been unable to commit the offence. *R v Barry Foster* [1985] 1 QB 115; 79 Cr App R 61 concerned an appellant, a man of previous good character and low intelligence, who in 1977 was interviewed by the police on several occasions concerning the rape and attempted rape of two 10-year-old girls (counts 1 and 4 respectively). He was alone for some of the interviews, and he was otherwise accompanied by his mother or a social worker. He was made the subject of an order under sections 60 and 65 of the Mental Health Act 1959. Thereafter, in December 1981 another man (Pearce) pleaded guilty to six offences against young girls, and he asked for 70 similar offences to be taken into consideration. Pearce's admissions showed conclusively that he had committed the offence in count 1 (rape) but he denied having committed count 4 (attempted rape). Indeed, during the appeal, counsel for the Crown indicated that he was instructed to say that in the opinion of the Director of Public Prosecutions the appellant was innocent of count 1. Furthermore, on count 4 the Crown conceded the conviction should be quashed and the court thereafter concluded (at page 72) that on the particular facts of the case "no jury properly directed could safely come to the conclusion that this appellant was guilty of count 4." Watkins LJ indicated that the court should only intervene in a case of this kind if the grounds were sufficiently compelling (page 67).

164. Scott Baker LJ described the approach to be taken to this situation in *Saik* at [51] as when there is "fresh evidence to show he was not guilty of the offence, [which is] a classic case of matters going to the safety of the verdict."

165. Similarly, in *R v Noel Jones* [2019] EWCA Crim 1059, an appeal was allowed against the appellant's conviction for manslaughter on the basis that later DNA evidence "wholly exonerated (the appellant) of involvement in this terrible crime." There had been only one attacker, who it was later demonstrated was someone

other than the appellant. The latter had seemingly pleaded guilty because of pressure that he felt at the time.

166. There are, however, two somewhat countervailing decisions about which we need to make some observations.

167. The first is *R v Lee* (the decision of 21 November 1983 in relation to the present appellant, set out above). The court, without considering whether an appeal following a guilty plea is to be approached in the same way as an appeal following a contested trial, adopted at page 114 the formulations provided by Lord Kilbrandon and Lord Diplock in *Stafford v Director of Public Prosecutions*, an appeal which focussed entirely on appeals following a contested trial (see [11] above).

168. The second is *R v Brady* [2004] EWCA Crim 2230. The appellant was identified by a police officer from CCTV footage as one of a pair of robbers at an off licence. She was arrested, confessed to the crime (along with a significant number of other offences) in the presence of her solicitor and pleaded guilty. In due course, two witnesses to the robbery said that they had known the appellant for many years and she had definitely not been one of the robbers. Significant questions arose as to the reliability of the identification by the police officer. This court, on an appeal, did not require the two witnesses or the appellant to give evidence. It was accepted that the evidence of the witnesses was capable of belief. The appellant, for her part, had committed such an abundance of offences she could not recall if this was one of them. The court did not analyse or apparently receive submissions on the test to be applied when it is submitted a conviction should be quashed following a guilty plea. The court simply observed at [14]:

> 'Once (the evidence from the two witnesses) is in and it is accepted that the contents of the statement are capable of belief, it seems to us simply to follow that the appellant's conviction for robbery is unsafe notwithstanding her plea of guilty.'

and at [15]

> 'If she pleaded guilty out of some motive unknown to the court, it would plainly not save the safety of the conviction." This latter passage prompted the editors of Archbold Criminal Pleading, Evidence and Practice 2022 Ed at 7-46 to note that the court in Brady had observed that "once the fresh evidence had shown the conviction to be unsafe, it mattered not what the reason for an unequivocal plea had been."

169. In our judgment, there is a significant difficulty shared by these two decisions (viz. *Lee* and *Brady*). The question of whether the appellant's conviction is unsafe – following public pleas of guilty, tendered in open court by a defendant who did not lack capacity, who knew what he had and had not done, and had been in receipt of appropriate legal advice – cannot simply be answered by reference to the approach that has historically been applied to convictions by a jury following a not guilty plea. That would be to ignore the effect of the guilty plea as an informed public admission of the offence.

170. In the context of an appeal against a conviction founded on the jury's assessment of the evidence, Lord Judge CJ sounded this warning in *R v Pope* [2012] EWCA Crim 2241; [2013] 1 Cr App R 14:

> '14. […] As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury. If, therefore, there is a case to answer and, after proper directions, the jury has convicted, it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this

> ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury.'

171. It can nevertheless exceptionally occur that a reasoned legitimate doubt may be entertained by this court about the verdict reached by the jury following disputed evidence, and this may be sufficient to establish that the conviction is unsafe. But following a freely made guilty plea, the conviction does not depend on the jury's assessment of disputed evidence. The evidence has never been heard, still less tested. It cannot be appropriate to enquire how it might have emerged and might have been assessed if there had been a trial. A submission that the evidence leaves a doubt about the guilt of the defendant is simply inappropriate. In such a case, of a free and informed plea of guilty, unaffected by vitiating factors, it will normally be possible to treat the conviction as unsafe only if it is established that the appellant had not committed the offence, not that he or she may not have committed the offence. Therefore, the test is not that of "legitimate doubt", still less a "lurking doubt", but instead it must be demonstrated that the appellant was not culpable. This is essentially consistent with four of the authorities set out above. In summary, the decision in *Verney* was based on the court's conclusion that the appellant could not have committed the offence because he had been custody at the relevant time. In *Barry Foster*, although Watkins LJ did not describe the approach in precisely these terms, he nonetheless set a high test when he suggested that no jury could be sure of the appellant's guilt, adding that the court should only intervene in a case of this kind if the grounds were sufficiently compelling. In *Saik*, fresh evidence demonstrating the appellant was not guilty of the offence was said to represent a classic example of material that potentially undermined the safety of the verdict. The DNA evidence in *Noel Jones* wholly exonerated the appellant.

172. As Lord Salmon observed in *DPP v Shannon* [1975] AC 717 at page 769, "a plea of guilty is equivalent to a conviction", where entered, we would add, by an individual who knows whether he or she committed the offence. It would be wrong in principle for a defendant to be entitled freely to enter a guilty plea, thereby convicting himself or herself, only later to seek to appeal that

> conviction simply by producing evidence that might have led a jury to doubt his or her guilt if there had been a trial, or by subjecting the evidence which might have been led at trial to a theoretical paper analysis in the absence of the witnesses. The objectionable nature of such a course is demonstrated in the instant case where many features of the evidence have never been and are now incapable of being tested. Therefore, although we consider the decisions in *Lee* and *Brady* were no doubt correctly decided on their facts given the strength of the evidence demonstrating the appellants had not committed the offences in question, the test applied by the court in both cases was incorrect. In consequence, with respect to the editors of Archbold, the observation at 7-46 concerning *Brady* is in our view unjustified and fails to reflect the correct approach.
>
> 173. An important common element across the three categories, therefore, is that the circumstances relied on by the appellant need to be established by him or her. That is merely an application of the normal rule that it is for an appellant to demonstrate that his conviction is unsafe. By way of summary, for the first category, the matters vitiating the plea must be demonstrated (e.g. that the plea was equivocal, unintended or affected by drugs etc.; there was a ruling leaving no arguable defence; pressure or threats narrowed the ambit of freedom of choice; misleading advice was provided or a defence was overlooked). For the second category, it must be shown that there was a legal obstacle to the defendant being tried for the offence or there was a fundamental breach of the accused's right under article 6 (whether he or she was guilty or not), and for the third category, it needs to be established that the appellant did not commit the offence. If that standard is not met, we would not expect an appeal against conviction following a guilty plea to succeed."

[69] Both parties to this appeal considered the import of *Tredget* in detail in the course of written and oral submissions. The appellant situates his argument within the first and second categories outlined above. He properly accepts that there is no argument under the third category.

[70] As to the first category, the appellant submits that the plea was entered on the basis of the judge's apparent comment that neither side will get what they want resulted in improper pressure, resulting in the appellant's defence counsel seeking a plea for a lower sentence.

[71] To our mind this is a difficult argument to make out. For one we note that the final amended grounds of appeal of 15 August 2018 do not actually make this case against the judge. In any event although the *Tredget* examples are indicated to be non-exhaustive, the wording of *Asiedu*, applied in the first category of *Tredget*, should not be read to extend an observation made by a judge to be read as a ruling, adverse or otherwise (see *Asiedu* para [20]; *Tredget* para [155]). It would be wrong to attach the same weight to a comment made in the *voir dire* process with a ruling that has force in law. The two operate on significantly different planes. Even so, the judge's comment (if made and we are to even 'read in' any meaning to it in the first place) would have worked both ways. Neither side getting what they wanted would not have been such an adverse comment from the trial judge so as to compel the accused's defence counsel to seek an agreement with the prosecutor. This is even more so the case when we consider that the appellant had the benefit of experienced and highly respected counsel (a point which the appellant accepted himself). It is patently too great a leap to suggest that the defence counsel, who were well-experienced with the cut and thrust of the trial process, would have been so concerned by what was at most an off-the-cuff comment, that they re-evaluated their entire defence strategy.

[72] As to the second category, Mr Mulholland observed that if coercion was at the heart of these interviews, an abuse of process can be established. Similarly, he made the case that if officers colluded (as suggested by Dr MacLeod), or if there is evidence of malpractice, these too are abuses of process with the effect that the court must ask whether it was fair to try the accused.

[73] In building this argument, the appellant pointed to the authority from the Court of Appeal in *Hamilton v Post Office*, which sets out the requirements for an abuse of process as follows:

> "64. The burden is on an accused to show, on a balance of probabilities, that he is entitled to a stay of proceedings on grounds of abuse of process. A stay of criminal proceedings is always an exceptional remedy, because "the majority of improprieties in connection with bringing proceedings can be satisfactorily dealt with by the court exercising its power of control over the proceedings" (*R v Togher and others* [2001] 1 Cr App R 33 at [33])."

[74] The court in *Hamilton* went on to cite Lord Dyson JSC in *R v Maxwell* [2010] UKSC 48, who said at para 13:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety

> to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry *in R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F)."

[75] This led the court in *Hamilton* to observe:

> "69. Where a defendant has entered an unequivocal and intentional plea of guilty, the resultant conviction will rarely be found to be unsafe. It is nonetheless possible for fresh evidence to be admitted and for an appeal to be allowed in such circumstances: see *R v Jones* [2019] EWCA Crim 1059 at [25]. […] As it was expressed in *R v Togher and others* at [59], the question is whether the guilty plea was "founded upon" the irregularity of non-disclosure."

[76] The appellant points to three aspects of the investigation and trial process that, he avers, amounts to an abuse of process. First, it is said that the interview process, as encapsulated as part of the prosecutorial process, amounts to an abuse of process as made clear by the conclusions of the expert reports. Second, there was an abuse of process when the interviewing officers misled the court when viewed alongside the statement-taking process of the RUC and the interviewing officers' denials of coercion or general oppression. Third, there was a basic failure to make full disclosure of the relevant materials that were withheld from the DPP, the defence and the trial judge (in relation to the complaint files and the AB interviews). These aspects, according to Mr Mulholland, amount to a breach of the appellant's fundamental right to a fair trial. Each of these arguments are dealt with in turn.

[77] The first argument relies on the conclusion of the expert reports. However, the court must remember that expert testimony only takes a case so far. As famously put by Lord Cooper in *Davie v Edinburgh Magistrates* (1953) SC 34, "[e]xpert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court." This is not to marginalise the role of the expert in these proceedings. Rather, it is a reminder that they act as only one piece of the puzzle.

[78] Their *ex post facto* opinions are undermined by the actual evidence given at the trial. Dr Robert Logan gave evidence on 11 May 1993. He was a general medical practitioner who was on call to the police office at Castlereagh. He saw the appellant each morning of his time there: 25, 26, 27 and 28 July 1991. On each occasion he asked him: "Have you been abused in any way by anybody while here?" Duffy replied "No" each time, as the doctor recorded. The appellant was offered a medical examination each time which he declined save for the 28th. Nothing material was found on cross-examination. The doctor noted he was: "Not distressed." In cross-examination Mr Adair for Duffy said his client "had no recollection of being seen by you."

[79] The appellant was taken to Antrim Road Police Station on 29 July 1993, where he was seen by Dr Basil Farnan, another GP who attended at that station on foot of a part-time contract with the Police Authority. He gave evidence before Murray LJ on 13 May 1993. Dr Farnan's evidence was that Mr Duffy was asked if he had any complaints. The doctor noted his response: "No complaint of any kind." He declined a medical examination.

[80] The importance of this contemporary absence of complaint is reinforced by the appellant himself. In his first Notice of Appeal, at paragraph 5 the following appears:

> "It is also <u>important</u> to note that the applicant complained contemporaneously to the doctor in the police station."

We know this to be untrue. It is a further indicator that the appellants recollection of events decades later is not to be relied on.

[81] We are driven to say that there are further pieces of the puzzle missing. It is unfortunate that the appellant was not able to give testimony before us. Doing so would have allowed the court to gain a fuller appreciation of his experiences. Without more we cannot be satisfied that he has established a valid case of ill treatment which is contrary to the medical evidence discussed above. Specifically, he did not complain of ill treatment, and it is inconsistent with the transcripts of evidence. Now, years on, counsel doing their best raise issues. However, the affidavit evidence from the appellant is also scant on detail in relation to this aspect of the case. This is not enough to ground a reliable case of coercion based upon ill treatment.

[82] The court is aware that the appellant has a medical certificate warning against testimony, but it remains the case that his testimony may have complemented the conclusions of the expert reports. Therefore, it becomes obvious that taken in isolation without the benefit of a positive case from the appellant, the expert evidence is not capable of belief in terms of establishing the appellant's individual

case. It follows that there is no basis to conclude that there was an abuse of process as was made out in *Tredget*.

[83] The second argument concerns the *voir dire* process itself; that there was an abuse of process as the interviewing officers were, to use the appellant's own phrase, "caught out in lie after lie." Yet, it is not the court's function to be drawn into a reanalysis of the *voir dire*. It should not be forgotten that the purpose of the *voir dire* is to test the evidence. If the appellant is right, then, in saying that the interviewing officers were being caught out in lie after lie, this surely would not have gone unnoticed by his counsel, or indeed by Mr Lynch or Murray LJ. It is also the case that the re-arraignment happened before the conclusion of the *voir dire* process; that is to say, the trial judge had not made his ruling on the admissibility of the evidence.

[84] The appellant had an inalienable right to change his plea before the conclusion of the *voir dire* process. And there is no doubt that he did so having received fair and frank legal advice from his counsel. But to say that there was an abuse of process because he did not like the direction that the hearings were headed is to ignore the fact that his counsel had the opportunity to cross-examine each of the interviewing witnesses in turn.

[85] This conclusion leads into Mr Mulholland's third argument which is strictly a non-disclosure argument, rather than one of abuse of process. This is because the other argument in relation to the confession as made falls at the hurdle that it was governed under the law at the time (see *R v Brown* [2013] NI 116, per Morgan LCJ). Following from the provisions of section 11 of the Northern Ireland (Emergency Provisions) Act 1973, there was a right to argue that any statement was inadmissible during the original *voir dire* process. That process took place. It is hard, therefore, to see how the *voir dire*, which was conducted with rigour by all parties involved, and overseen attentively by Murray LJ as the trial judge, was so flawed that it amounted to an abuse of process.

[86] In any case, the essence of the appellant's argument at this point is that the lack of prompt disclosure frustrated the defence's efforts at trial. In this regard, the appellant highlights three offending pieces of evidence: (i) the late disclosure of the telephone messages; (ii) the AB interviews; and (iii) the complaint files of the interviewing officers.

[87] The appellant points out that the disclosure of the messages did not happen until three weeks after the commencement of the *voir dire*. However, the appellant submits that the utility of the information does not become apparent until viewed alongside the AB disclosure. In particular, the appellant points to the following information, disclosed by the PPS in correspondence dated 9 September 2021:

> "Police hold information, dating from September 1985, which suggests that the Mahons were taken to Turf Lodge in a taxi being driven by AB. After the shooting two

> persons drove away in a blue Cortina with a girl driving and the two got in the taxi with AN driving. The taxi hit a car outside Norglen Grove. All three persons got out of the taxi and went into 51 Norglen Drive. AB did not get into the house and was standing in the vicinity when police drove past."

[88] Viewed in conjunction with messages 7 and 8 of the gisted material (which named AB as a potential suspect), the appellant says that his defence team would have been able to establish that damage was caused to AB's taxi, and also to highlight the assertions made by the police (during AB's interviews), which would have placed the defence in a much stronger position to contest the admissibility of the confession evidence, providing an alternative suspect. The prosecution's response to this point is that the AB interviews do not take the appellant to the conclusion that he wants. Put simply, they say that the AB material has no relevance to the other confessions made by the appellant (to the conspiracy to murder, possession, and membership charges), and that in any case it was open to the RUC to conclude that AB was the wrong man. As such, it is the prosecution's case that the key material in terms of disclosure, was the intelligence disclosed to the defence in the Lynch note. The appellant further says that the failure to disclose the complaint files left the defence at an unfair disadvantage.

[89] Thus, the essential submission on disclosure is that the appellant pleaded guilty whilst unaware of material that went to the heart of the credibility of the interviewing officers at trial and provided clear evidence of a viable alternative suspect who had been arrested and interviewed for performing the very role that the appellant's confession related to.

[90] We are wholly unpersuaded as to the merits of the non-disclosure claim. True it is that the AB interview material has now been provided however this must be seen in the context that considerable material was available at trial in terms of the gisted material and the Lynch note which allowed the appellant to make an informed choice. We do not accept Mr Mulholland's case that further and better material information has been provided which tips the balance in the appellant's favour. There is no evidence that the DPP or prosecution team withheld vital disclosure. The additional information simply expands on information already provided as the core circumstances of the case were known. Thus, the additional information now provided is not of such a fundamental nature to establish a case of non-disclosure.

[91] In any event, we observe that this argument could only avail the appellant in relation to the manslaughter charges against the Mahons. Of course, even if we were persuaded by the argument, which we were not, the appellant's other convictions for terrorist offending would not be affected and so overall it cannot be said that a miscarriage of justice arises even on the appellant's own case.

[92] Despite his sterling efforts Mr Mulholland has failed to persuade us that this case comes within any of the *Tredget* categories which enable a court to look behind a plea of guilty.

[93] The remaining arguments based upon the expert reports also cannot avail the appellant. We accept the points made in the reports that the questioning and conditions at the time at Castlereagh are open to criticism in various respects. This is not a new argument in our courts. Neither is it an argument that can automatically upset a historic conviction of itself without an evidential basis. This is particularly so in a case such as this where a guilty plea was entered.

[94] However, the principal reason why this expert evidence does not lead us to question the safety of the conviction is that it does not persuade us upon the appellant's core contention that he was forced into entering a plea of guilty. So, whilst of theoretical interest the expert opinion does not answer the core question in the appellants favour because as we have said none of the *Tredget* categories of case are satisfied.

[95] In light of the foregoing we address the four questions required of section 25 as follows:

(a) The fresh evidence from the experts is on the face of it capable of belief as subjective opinions in relation to historic practice and procedure.

(b) However, we do not consider that the fresh evidence affords a ground for appealing. That is because none of the expert reports persuade us as to why we should vitiate a plea of guilty freely given and the appellant himself has not convinced us that he meets any of the tests for when such a plea should be vitiated.

(c) Whilst the reports may now be admissible as a subjective opinion as to past events this evidence would not have been available and therefore not admissible at the trial on an issue which is the subject of the appeal.

(d) There is no reasonable explanation for the failure to adduce the evidence at the trial for obvious reasons as the reports are an *ex post facto* overview of historic events.

[96] As is apparent we have had regard to the matters specified in section 25(2)(a)-(d) and to our overriding discretion to receive fresh evidence if we think it necessary or expedient in the interests of justice to do so. We do not consider that the evidence, if given at trial, could reasonably have affected the decision of the trial jury to convict.

[97] Therefore, none of the fresh evidence including the appellant's affidavit evidence can establish a valid ground of appeal. Accordingly, it not necessary or in the interests of justice to admit the fresh evidence and so we refuse the applications.

[98] In reaching our conclusion we confirm that we have considered the transcripts of the trial in detail including the additional note filed on behalf of the appellant which summarises his evidence during the *voir dire*. To be clear, it is our firm view that the materials from the trial do not avail the appellant as he suggests. That is because, viewed in context, we do not consider this a case of coercion by virtue of alleged ill treatment or undue pressure brought to bear by the judge is made out. Additionally, in our view the complaint files add nothing of substance in this case.

[99] Rather, as we have stressed, the undeniable truth is that the appellant made his own free choice to plead guilty having been offered reduced charges. He may regret his choice now many years later but that is not sufficient to overturn a conviction.

[100] In summary, we broadly agree with the prosecution submissions helpfully set out in the following sequence which we borrow in large part from the prosecution skeleton argument, and which were advanced with skill by Mr Murphy KC:

(i) The present appeal must be seen in the context of a lengthy challenge to the admissions in a *voir dire* lasting 16 days. There was a lengthy *voir dire*, the appellant was represented by senior counsel, no complaint is made as to the timing or nature of the advice, nor that there was pressure applied by counsel or interference from the trial judge. In particular, the appellant had been cross-examined in the *voir dire* for a lengthy period and was fully aware of the issues involved and the relative strengths and weaknesses of the respective prosecution and defence case.

(ii) The Court had not made a ruling in respect of the *voir dire*. This was not a case where an adverse (and erroneous) ruling was made which made it legally impossible or very difficult to maintain a defence. In contrast the comment by the learned Judge could be interpreted as partially encouraging as it indicated that some compromise was envisaged.

(iii) The appellant was not denied disclosure of material or was otherwise ignorant of material directly going to the issue that other persons had been named as the driver of the taxi. In contrast the prosecution provided a gist of this material in order to supply the appellant with information as to who else had been named as the driver of the taxi and in what circumstances. The only matter redacted was the identity of the source although self-evidently the fact of a source was known.

(iv) There is no evidence that the DPP or prosecution team withheld vital disclosure.

(v) There is no evidence that the appellant sought to make further requests for disclosure, either about identifying the source with the intention of identifying potential defence witnesses or to ascertain the nature of the view that any potential witness may have had from their vantage point.

(vi) Whilst there is no evidence that AB's interviews were disclosed it is reasonable to assume that the appellant's then counsel, once provided with the gist of the intelligence material would have enquired with the prosecution or raised the issue with the court as to whether the persons named were interviewed by police. The AB interviews do not themselves appear to have featured at the time, but the absence of available transcript means that the court does not now know what was put. However, there were numerous detectives questioned over many days to whom the appellant's case was put and disclosure having been made on 12 May any matters arising therefrom could also have been put to witnesses or into evidence.

(vii) Whilst the appellant complains as to the absence of disclosure of complaints in respect of the interviewing officers, none of these complaints were ultimately established. In addition, the appellant did not provide credible and comprehensive evidence of complaints at the time. Therefore, it is not likely that the trial judge would have placed significant or any weight on untested allegations.

(viii) In respect of the expert evidence, at the time of trial this would not have been in existence. There is no issue of non-disclosure as the methods of interrogation deployed were not uncommon at that time.

(ix) The appellant could have elected to continue with the challenge to his admissions but made a tactical decision to approach the prosecution with regard to pleas to manslaughter; this approach conferred a significant benefit to him with regard to sentence.

Conclusion

[101] The interests of justice require that those who are involved in the criminal process should make their case at their trial. Where a guilty plea is entered it is only in highly circumscribed circumstances that it can be vitiated. This preserves the certainty of the justice system.

[102] In parallel to preserving certainty all courts must be alive to the fact that miscarriages of justice can occur. We have kept this possibility clearly in mind when deciding this case. As such we have considered all of the arguments made with great care and decided this case on the basis of its own facts. Having done so we do

not consider that there was any unfairness in this case by reason of any failure of disclosure or alleged coercion which would lead us to vitiate the guilty plea.

[103] The outcome in cases of this nature will depend on the facts. Critically, in this case we know that the appellant was represented by experienced counsel in whom he had complete confidence. No appeal was advanced or recommended by the lawyers representing the appellant, most likely because he received a much-reduced sentence in not having to face the murder charges. The appellant took no further steps for some 25 years and cannot now come into court to try to revoke a choice freely made to plead guilty to a series of offences.

[104] Therefore, equipped with the full facts, we as a full court do not find a sound basis for extension of time for appeal. Additionally, we do not consider the applications to admit fresh evidence should succeed.

[105] For the reasons we have given and having considered this case fully on its merits we are satisfied as to the safety of these convictions which followed pleas of guilty by the appellant. Accordingly, we dismiss the appeal.